

§ 784.131

first processing, canning, or packing within the limits of a port or harbor is not performing them “at sea” within the meaning of the legislative intent although the situs of performance is subject to tidewaters. In any event it would not appear necessary to draw a precise line as to what constitutes “at sea” operations, for, as a practical matter, such first processing, canning, or packing operations are those closely connected with the physical catching of the fish and are performed on the fishing vessel shortly or immediately following the “catching” and “taking” of the fish.

§ 784.131 “As an incident to, or in conjunction with”, fishing operations.

The statutory language makes clear that the “first processing, canning, or packing,” unlike the other named operations of “catching, taking, propagating, harvesting, cultivating, or farming” are not exempt operations in and of themselves. They are exempt only when performed “as an incident to, or in conjunction with such fishing operations” (see *Farmers Reservoir Co. v. McComb*, 337 U.S. 755). It is apparent from the context that the language “such fishing operations” refers to the principal named operations of “catching, taking, propagating, harvesting, cultivating, or farming” as performed by the fishermen or fishing vessel (compare *Bowie v. Gonzales*, 117 F. 2d 11). Therefore to be “an incident to, or in conjunction with such fishing operations”, the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is made abundantly clear by the legislative history. In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the “first processing, canning, or packing” of marine products “at sea as an incident to, or in conjunction with such fishing operations.” The purpose of this additional provision is to make certain that the Act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

29 CFR Ch. V (7–1–11 Edition)

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. *Mitchell v. Hunt*, 263 F. 2d 913; *Farmers Reservoir Co. v. McComb*, 337 U.S. 755).

§ 784.132 The exempt operations.

The final requirement is that the employee on the fishing vessel must be employed in “the first processing, canning or packing” of the marine products. The meaning and scope of these operations when performed at sea as an incident to the fishing operations of the vessel are set forth in §§ 784.133 to 784.135. To be “employed in” such operations the employee must, as previously explained (see §§ 784.106 and 784.121), be engaged in work which is clearly part of the named activity.

§ 784.133 “First processing.”

Processing connotes a change from the natural state of the marine product and first processing would constitute the first operation or series of continuous operations that effectuate this change. It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which ordinarily immediately follow these operations, would also constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of “freezing”, as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such